No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETER \NS AFFAIRS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. *Auer* Deference Increases Regulatory Uncertainty 5

II. *Auer* Deference In Action: A Litany of "Greatest Misses." 8

III. *Seminole Rock* And *Auer* Should Be Overruled 14

A. *Auer* and *Seminole Rock* Violate Separation-Of-Powers Principles 14

B. *Auer* and *Seminole Rock* Are Contrary To The APA 16

C. *Auer* and *Seminole Rock* Cannot Be Justified On Policy Grounds 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Bigelow v. Dep't of Defense,
217 F.3d 875 (D.C. Cir. 2000) 10

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 7

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 6, 8

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 5

Cope v. Let's Eat Out, Inc., — F. Supp. 3d —,
2019 WL 79367 (W.D. Mo. Jan. 2, 2019) 9

E.I. Du Pont De Nemours & Co. v. Smiley,
138 S. Ct. 2563 (2018) 7

F.C.C. v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 5

Garco Constr., Inc. v. Spear,
138 S. Ct. 1052 (2018) 12, 15

Grayned v. City of Rockford,
408 U.S. 104 (1972) 8

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 7, 8, 14

Kentuckians for Commonwealth Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 10

M.R. v. Dreyfus, 697 F.3d 706 (9th Cir. 2012) 13

Marsh v. J. Alexander's LLC,
905 F.3d 610 (9th Cir. 2018) 7, 8, 9

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 19

Montejo v. Louisiana, 556 U.S. 778 (2009) 18

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 7

Pearson v. Callahan, 555 U.S. 223 (2009) 15

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) ..... *passim*

Pub. Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 19

San Diego Gas & Electric Co. v. FERC,
— F.3d —, 2019 WL 190306
(D.C. Cir. Jan. 15, 2019) 11, 12

Shalala v. Guernsey Memorial Hospital,
514 U.S. 87 (1995) 12

Talk America, Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 (2011) 6, 14

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 6

United Student Aid Funds, Inc. v. Bible,
136 S. Ct. 1607 (2016) 8, 13

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.,
550 U.S. 81 (2007) 19

Statutes & Regulation

5 U.S.C. § 551 16

5 U.S.C. § 553 ..... 5, 17

5 U.S.C. § 706 ..... 4, 16, 17

38 U.S.C. § 501 5

38 U.S.C. § 502 16

38 U.S.C. § 7261 16

38 U.S.C. § 7292 16

18 C.F.R. § 35.35 11

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About Hiring Our Heroes,
https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited
January 29, 2019) 2

Brief for Respondent Federal Energy Regulatory Commission, *San Diego Gas & Electric Co. v. FERC*, No. 16-1433, at 2 (D.C. Cir. filed Sept. 15, 2017) 11

Allyson N. Ho, *Why Seminole Rock Should Be Overruled*, 36 Yale J. on Reg.: Notice & Comment (Sept. 19, 2006), http://yalejreg.com/nc/2039-2/ 18

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 637 (1996) 15, 17

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

The business community has a particular interest in the interpretive principles applied to federal regulations. Given the breadth of federal regulations, virtually every business in America, large or small, has at least some portion of its work regulated by federal agencies. These businesses have a strong interest in the proper interpretation of agency regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The U.S. Chamber also has an interest in this case because it involves a veteran who was wrongly denied disability benefits. The U.S. Chamber actively sup-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties consented to this filing.

ports veterans through "Hiring Our Heroes," a nationwide initiative launched in March 2011 to help veterans, transitioning service members, and military spouses find meaningful employment opportunities. *See* About Hiring Our Heroes, https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited January 29, 2019). To date, more than 31,000 veterans and military spouses have obtained employment opportunities through Hiring Our Heroes events. And more than 505,000 veterans and military spouses have been hired by more than 2,000 companies as part of the "Hiring 500,000 Heroes" campaign. *Id.* Given its commitment to supporting veterans, the U.S. Chamber has an interest in ensuring that veterans like Petitioner do not have their rights abridged by vacillating agency interpretations.

The Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable members lead companies that together have more than $7 trillion in annual revenues and employ more than 15 million employees. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as *amicus* where important business interests are at stake. Those interests include the clarity and stability of federal agency regulations to which its members and their companies are subject.

Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller

freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR's member railroads are subject to regulation by a number of federal agencies and therefore have a strong interest in the proper interpretation of agency regulations.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The business community benefits from laws that are clearly written and consistently applied. Notice-and-comment rulemaking provides businesses with an opportunity to help shape the regulatory landscape in which they operate. When the rulemaking process functions properly, regulated companies receive fair notice of what conduct is required or prohibited and are able to order their operations accordingly.

Auer deference creates a strong incentive for agencies to adopt vague regulations that they can later interpret however they see fit. This practice upsets the expectations of regulated parties and deprives them of the notice provided through rulemaking. Where agencies adopt vague regulations, businesses must attempt to predict how the agency will interpret those regulations and also how likely the agency is to change that interpretation in the future—often with no warning or opportunity to comment. *Auer* defer-

ence also makes it difficult to track an agency's shifting interpretations, which frequently appear in unpublished manuals, third-party letters, and *amicus* briefs.

II. Experience demonstrates the harmful real-world effects *Auer* has on businesses. In many cases, *Auer* deference has led courts to uphold agency interpretations that appear in obscure locations and do not comport with the best reading of the regulations in question. The result is increased compliance costs and staggering damages claims that cannot be predicted fairly from the rules.

III. *Auer* and *Seminole Rock* should be overruled because they violate separation-of-powers principles and conflict with the Administrative Procedure Act ("APA"). *Auer* deference violates separation-of-powers principles because it allows agencies both to write the laws and interpret them. *Auer* deference also conflicts with the plain language of Section 706 of the APA, which requires "the *reviewing court* [to] ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added).

Policy considerations do not support continued adherence to *Auer* and *Seminole Rock* either. An agency's policy preferences, which are always subject to change, have no bearing on the purely interpretive task of deciding what the text of a rule *means*. Eliminating *Auer* deference will not prevent agencies from interpreting the rules they issue, or from amending those rules prospectively based on changed policy preferences. Rather, overruling *Auer* and *Seminole Rock* would simply ensure that when an agency issues a rule, that rule is always given its best meaning.

ARGUMENT

I. *Auer* Deference Increases Regulatory Uncertainty.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To ensure that federal regulations comply with this fundamental principle, the APA generally requires agencies to engage in notice-and-comment rulemaking before issuing substantive, binding regulations. *See* 5 U.S.C. § 553(b); *see also* 38 U.S.C. § 501(d) ("The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Secretary."). Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Notice-and-comment rulemaking provides businesses with an important opportunity to help shape the administrative decisions that govern their industries. Every decision that a business makes—from hiring employees and opening new facilities to marketing and selling its products—requires an assessment of the legal implications of that decision. Where notice-and-comment rulemaking is used, businesses have the opportunity to present information to sup-

port the most sensible solutions to regulatory questions that affect their industries. And even where a regulated company's views are not reflected in the final regulations, businesses still benefit from having participated in the process because they gain a better understanding of the standards by which their conduct will be judged.

Auer and *Seminole Rock* undermine the important role played by notice-and-comment rulemaking. As the Court has explained, *Auer* deference encourages agencies to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (quoting *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). The temptation for the agency to side-step formal rulemaking makes sense from the agency's perspective: issuing "vague regulations . . . maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor, Ginsburg, JJ.). But this incentive comes at the expense of clarity and predictability.

Seminole Rock and *Auer* also harm regulated companies by making it difficult to keep track of an agency's shifting views. When agencies engage in notice-and-comment rulemaking, they publish proposed rules in the Federal Register, and regulated parties know that they must watch the Federal Register for

rules that could affect them. But tracking an agency's interpretations of vague regulations is considerably more challenging because those interpretations could appear almost anywhere. For example, in *Auer*, the Court deferred to an agency interpretation advanced for the first time in an *amicus* brief. 519 U.S. at 461; *accord Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011).[2] The Court also has deferred to one agency's interpretation of another agency's regulation. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991). And the Ninth Circuit recently deferred to an interpretation set forth in an agency field manual that claimed not to be "a device for establishing interpretive policy." *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 627 (9th Cir. 2018). The *Auer* doctrine has created a world in which businesses must scour court dockets, *amicus* briefs, agency websites, internal field manuals, letters sent to other companies, and other agencies' policies to fully understand the regulatory regime in which they operate.

The business community suffers from this approach to regulation. Where agencies promulgate vague rules that they can interpret later in a myriad of ways, companies have difficulty predicting what conduct is required or prohibited. Under *Auer*, it is not enough for a regulated entity to hire "an army of perfumed lawyers and lobbyists" to determine the

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[2] Commentators have observed that certain agencies have "become particularly aggressive in 'attempt[ing] to mold statutory interpretation and establish policy by filing "friend of the court" briefs in private litigation.'" *E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2564 (2018) (Gorsuch, J., respecting the denial of certiorari).

fairest reading of vague regulations or to seek guidance from the agency. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "Even if the [regulated party] somehow manage[s]" to divine the agency's preferred interpretation, it "must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Id.* This approach is inconsistent with the fundamental due process notion that regulated parties must be "free to steer between lawful and unlawful conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

In *Christopher*, the Court took an important step to limit *Auer* and *Seminole Rock* by refusing to defer to an agency's interpretation of ambiguous regulations that "impose[d] potentially massive liability ... for conduct that occurred well before that interpretation was announced." 567 U.S. at 155–56. But *Christopher* has not eliminated *Auer*'s adverse effects on businesses. On the contrary, *Auer* deference has continued to "metastisiz[e]" in the intervening years. *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

II. *Auer* Deference In Action: A Litany of "Greatest Misses."

Auer deference leads to results that depart from the best reading of applicable regulations and that increase regulatory uncertainty. Several "greatest misses" illustrate the need for *Auer* and *Seminole Rock* to be overruled.

A recent en banc Ninth Circuit decision epitomizes the uncertainty created by *Auer*'s "nesting dolls" approach to layer upon layer of deference. *Marsh*, 905 F.3d at 634 (Graber, J., concurring in part and dissenting in part). At issue in *Marsh* was the interpretation of the Department of Labor's "dual jobs" regulation for tipped employees—a regulation that itself "d[oes] not track the statute." *Id.* at 639 (Ikuta, J., dissenting). "As it has done on many earlier occasions, the [Department of Labor] issued its" interpretation of the "dual jobs" regulation "through an unpublished internal manual, and then sought controlling deference via an amicus brief." *Id.* at 651 (Ikuta, J., dissenting). That interpretation perplexingly defined one term ("dual jobs") to have two different meanings. *Id.* at 634 (Graber, J., concurring in part and dissenting in part). Both the district court and the Ninth Circuit panel recognized the problems with the agency's interpretation and refused to defer to it, characterizing the position as "a de facto new regulation masquerading as an interpretation." *Id.* at 617. But the en banc Ninth Circuit relied on *Auer* to reverse, *id.* at 632, exposing businesses "to staggering damages claims." *Id.* at 651 (Ikuta, J., dissenting).

The story does not end there. After the en banc Ninth Circuit decision, the Department of Labor revised its interpretation of the rule, rejecting the interpretation of "dual jobs" to which the Ninth Circuit deferred. *See* U.S. Dep't of Labor, Opinion Letter FLSA2018-27 (Nov. 8, 2018), https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_27_FLSA.pdf. But because of this rapid change in position, a federal

court recently refused to defer to the agency's new interpretation, leaving the meaning of the regulation in flux once again. *See Cope v. Let's Eat Out, Inc.*, — F. Supp. 3d —, 2019 WL 79367, at *5 (W.D. Mo. Jan. 2, 2019). The result is a regulatory hall of mirrors where the hundreds of thousands of businesses that hire tipped employees cannot reliably determine the meaning of a rule they are required to follow.

Tales of similarly problematic applications of *Auer* deference abound. In another case, *Auer* deference led the D.C. Circuit to uphold an agency interpretation "dramatically expand[ing] the number of people" who can "examine highly sensitive personnel security files." *Bigelow v. Dep't of Defense*, 217 F.3d 875, 881–82 (D.C. Cir. 2000) (Tatel, J., dissenting). These files contain "information about political associations, criminal or dishonest conduct, mental illness, family relationships, financial circumstances, drug and alcohol use, sexual behavior, etc." *Id.* at 878. Because of the sensitivity of that information, federal regulations specified a discrete list of officials who could access the security files. *See id.* But based on "nothing more than the position of the U.S. Attorney and the two AUSAs who signed the brief," the Government read in an exception that gave *additional* access "to any supervisor anywhere in the Department who doubts an employee's loyalty." *Id.* at 880. The D.C. Circuit nevertheless deferred. *Id.* at 881–82.

Likewise in *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003), the Fourth Circuit granted *Auer* deference to an agency interpretation that had not even been articulated by the agency in question. Instead, the court "divine[d]"

and then deferred to an interpretation that likely contradicted the text of the regulation. *Id.* at 450–51 (Luttig, J., concurring in part and dissenting in part). The majority accomplished this divination by "reviewing the ten years of correspondence between the EPA and the Corps." *Id.* at 451 (Luttig, J., concurring in part and dissenting in part). The holding imposes on regulated companies the task of parsing years of agency correspondence to decipher an interpretation that contradicts the text of the rule.

Just weeks ago, a panel of the D.C. Circuit issued yet another opinion "demonstrat[ing] the perils of deferring to an agency's wayward interpretation of its own regulation." *San Diego Gas & Electric Co. v. FERC*, — F.3d —, 2019 WL 190306, at *14 n.4 (D.C. Cir. Jan. 15, 2019) (Randolph, J., dissenting). The case involved a Federal Energy Regulatory Commission incentive regulation that grants utilities the right to "[r]ecove[r] ... 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility." *Id.* at *2; *see id.* at *10 (quoting 18 C.F.R. § 35.35(d)(1)(vi)). Even though the regulation does not exclude costs based on when they were incurred, FERC interpreted this "100 percent" recovery rule as applying only to costs incurred after FERC issues an order determining that a facility is eligible for the incentive. *See id.* at *5. As a result, the order "granted [the utility] some $15 million less than 100 percent of the costs of the project." *Id.* at *14 (Randolph, J., dissenting).

The Commission defended its interpretation by invoking *Auer* deference,[3] and a divided panel of the D.C. Circuit granted the Commission's request, "defer[ring] to FERC's interpretation" of the regulation. *Id.* According to the panel majority, the Commission reasonably read the regulation as allowing "less than 100 per cent" recovery "where circumstances so demand." *Id.* at *10. As that outcome shows, *Auer* deference results in a regime under which businesses cannot reliably anticipate a rule's meaning even when it speaks in clear, mathematical terms. A doctrine that permits agencies to award less than 100 percent of costs under a regulation stating that "100 percent" of costs are recoverable, *id.*, is not a doctrine worthy of continued application.

Yet another example of an agency using *Auer* and *Seminole Rock* to skirt notice-and-comment rulemaking is *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995). There, a statute required the Secretary of Health and Human Services to promulgate regulations establishing rules for Medicare cost reimbursements. *See id.* at 91–92. The agency promulgated a rule, but that rule did not address the specific reimbursement question Congress had delegated. *See id.* at 92–93; *id.* at 103 (O'Connor, J., dissenting). Instead, the agency resolved the question in a subsequent reimbursement manual that did not go through notice-and-comment rulemaking. *See id.* at 110 (O'Connor, J., dissenting). The Court granted controlling deference to that manual under *Seminole Rock*

[3] Brief for Respondent Federal Energy Regulatory Commission, *San Diego Gas & Electric Co. v. FERC*, No. 16-1433, at 2 (D.C. Cir. filed Sept. 15, 2017).

despite this shortcoming. Thus, *Seminole Rock* enabled the agency to circumvent Congress's mandate and deprive "the public [of] a valuable opportunity to comment on the regulation's wisdom." *Id.* (O'Connor, J., dissenting).

Auer deference likewise has led to anomalous results in numerous other cases. *See, e.g., Garco Constr., Inc. v. Spear*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from denial of certiorari) (discussing Federal Circuit opinion that blessed the Army's "textually dubious" change to a rule interpretation that favored the Army in a pending contract dispute); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (criticizing Seventh Circuit opinion that relied on *Auer* to find a defendant liable for breach of contract based on an interpretation, announced for the first time in an *amicus* brief and that was "at odds with the regulatory scheme [and] defie[d] ordinary English"); *M.R. v. Dreyfus*, 697 F.3d 706, 716 (9th Cir. 2012) (Bea, J., dissenting from denial of rehearing en banc) (criticizing deference to Department of Justice statement of interest asserting that "an *even-handed* reduction of a voluntarily-provided welfare benefit" constituted "'discrimination' under the" Americans with Disabilities Act (emphasis added)).

In short, *Auer* deference gives agencies the incentive to promulgate broad, shapeless regulations, thus undermining the purpose of notice-and-comment rulemaking; license to ignore the most natural reading of their own rules; and the ability to adopt interpretations in obscure, difficult-to-find locations beyond the reach of many regulated parties. The result is great

uncertainty for the business community and the broader public who benefit from clear regulations that provide fair notice of what is required or prohibited. It also imposes significant costs, both in terms of compliance and potential damages, for businesses of all sizes that miscalculate the agency's position.

III. *Seminole Rock* And *Auer* Should Be Overruled.

Auer and *Seminole Rock* defy the Constitution's separation of powers, cannot be reconciled with the text of the APA, and cannot be justified by policy considerations. They should be overruled.

A. *Auer* and *Seminole Rock* Violate Separation-Of-Powers Principles.

Auer and *Seminole Rock* should be overruled because they violate separation-of-powers principles. By giving "controlling weight" to most agency interpretations, courts "violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). This deference "to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America, Inc.*, 564 U.S. at 69 (Scalia, J., concurring). In this

way, *Auer* is "a dangerous permission slip for the arrogation of power." *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part, dissenting in part).

Auer deference also flouts the Constitution's guarantee that cases and controversies will be decided by "neutral decisionmakers who will apply the law as it is, not as they wish it to be." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). Just as a court would not defer to an act of Congress purporting to interpret a prior statute, so it should not defer to an agency's interpretation of its prior regulations. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 651–54, 691–92 (1996).

This case demonstrates the threat to separation-of-powers principles posed by *Auer* and *Seminole Rock*. In the middle of the adjudication of a veteran's benefit claim, the agency advanced an interpretation of its own regulation that caused Petitioner to lose approximately 23 years of retroactive benefits. *See* Pet. App. 14a–15a & n.10. The Federal Circuit deferred to the agency's interpretation despite recognizing that Petitioner had advanced a reasonable interpretation of the agency's rule. *See* Pet. App. 16a. "This type of conduct 'frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government,'" *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting), resulting in "precisely the abuse[] that the Framers sought to prevent," *Perez v.*

Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring).[4]

B. *Auer* and *Seminole Rock* Are Contrary To The APA.

The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.[5] The statute further defines "agency action" to "include[] the whole or a part of an agency rule." 5 U.S.C. § 551(13). Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in . . . regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (emphasis added). Despite the Court's contrary holdings in *Auer* and *Seminole Rock*, the APA makes clear that it is "the

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[4] *Stare decisis* poses no obstacle to reversal because *Auer* and *Seminole Rock* set forth a judge-made interpretative rule. *See Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J., concurring in the judgment) (citing Caleb Nelson, *Statutory Interpretation* 701 (2011)). The Court can set aside the doctrine in the same way it could set aside other "judge-made rule[s]" when "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

[5] The statutory dictate that courts, rather than agencies, interpret regulations applies equally to the VA. *See* 38 U.S.C. § 502 (providing that review of VA rules "shall be in accordance with chapter 7 of title 5"); *see also* 38 U.S.C. § 7261(a)(1) (requiring the Court of Appeals for Veterans Claims to "determine the meaning or applicability of the terms of an action of the Secretary"); 38 U.S.C. § 7292(d)(1) (requiring Federal Circuit to "hold unlawful and set aside any regulation or any interpretation thereof" it finds to be "an abuse of discretion, or otherwise not in accordance with law").

responsibility of the court to decide whether the law means what the agency says it means." *Id.*

Auer deference contradicts this statutory scheme by requiring courts to accept an agency's interpretation of its own action that differs from the best reading of that action. Indeed, "[s]o long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says." *Id.* at 1212 (Scalia, J., concurring in the judgment). Had Congress contemplated the sort of plain-error review that *Auer* imposes, it could have said so in the APA. But Congress instead instructed courts to determine the meaning of agency action, which requires more than deferring to the agency except when its interpretation is plainly erroneous.

Interpreting the APA to require judicial determination without *Auer*'s binding deference regime also comports with traditional understandings of the meaning of judicial review. It is one thing for an agency to express its views on what its regulation means and to advocate that courts should follow that interpretation. But it is another thing entirely to *require* courts to accept those views even where the text, structure, and history show the superiority of a different reading. The judicial power "requires a court to exercise its independent judgment in interpreting and expounding upon" regulations. *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment). Section 706 of the APA must be read in conformity with this long-held understanding of the judicial power. *See* Manning, *supra*, at 637.

Auer further conflicts with the APA because it contradicts the statute's basic structure. The APA requires rules that will have the force and effect of law to go through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. Although the APA allows non-binding interpretive rules to be issued without notice-and-comment rulemaking, these rules only can "*advise* the public by explaining [the agency's] interpretation of the law." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Interpretive rules cannot be used "to *bind* the public by making law." *Id.*

The *Auer* doctrine circumvents these legislative safeguards. Agencies now can issue interpretations that are given binding deference unless they are so strained as to be plainly erroneous. Because people are "bound to obey [such interpretations] on pain of sanction," interpretations "that command deference *do* have the force of law." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). *Auer* therefore creates a "loophole" to the APA's statutory scheme that is "at odds with the APA's fundamental structure." Allyson N. Ho, *Why Seminole Rock Should Be Overruled*, 36 Yale J. on Reg.: Notice & Comment (Sept. 19, 2006), http://yalejreg.com/nc/2039-2/.

The Court has never attempted to reconcile *Auer* deference with the text of the APA or similar statutes. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. *See id.* Because *Auer* and *Seminole Rock* conflict with the APA, those decisions are not sufficiently "well reasoned" for

the Court to continue following them. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

C. *Auer* and *Seminole Rock* Cannot Be Justified On Policy Grounds.

Policy considerations do not support continued adherence to *Auer* and *Seminole Rock*. In particular, *Auer* deference cannot be justified based on agencies' purported expertise in divining the true intent of ambiguous regulations. *Cf., e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991).

Policy expertise may be relevant to an agency's decision to adopt particular regulations, but that expertise is irrelevant to the purely interpretive task of determining what the text of those regulations means. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment) ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means."). And even if the intent of the original drafter of the ambiguous regulations could be determined, that subjective intent should carry no weight. The ambiguity should instead be resolved by determining the best reading of the regulation based on the traditional tools of interpretation. *See id.* at 1222–23; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in the judgment) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."); *see also Zuni Pub. Sch.*

Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.").

Overruling *Auer* and *Seminole Rock* would not deprive agencies of the ability to interpret the regulations they issue or to amend those regulations when circumstances or changes in policy require. Even without *Auer* deference, an agency would remain free to adopt its own view of what a particular regulation means, and to advocate for that view in litigation—either as a party or as *amicus curiae*. Absent *Auer* deference, agencies would also have the ability to revise the scope of their rules through notice-and-comment rulemaking—a mechanism that, unlike deference to agencies, Congress expressly included in the APA. Indeed, dispensing with *Auer* deference would affect agencies in only one narrow way: they would lose the ability to force courts to accept second- or third-best rule interpretations. There is no good reason to continue that practice.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted,

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